Mahrus v Public Prosecutor

HIGH COURT (KUCHING) — CRIMINAL APPEAL NO KG13 OF 1990
CHONG SIEW FAI J
17 JUNE 1991

Criminal Procedure *— Sentencing — Gang robbery — Accused participated in gang robbery but did not use deadly weapon — Whether court has discretion to order whipping — Penal Code (FMS Cap 45) s 397*

The appellant was charged with three offences of gang robbery. He was alleged to have committed the offences on three different dates together with five others. It was also alleged that a deadly weapon, namely, a knife was used. The appellant pleaded guilty to the three charges punishable under ss 395 and 397 of the Penal Code (FMS Cap 45). The sessions court sentenced the appellant to eight years' imprisonment for each charge and four strokes of the rattan. The imprisonment sentences were to run concurrently. The sessions court judge held that whipping was mandatory in this case. The appellant appealed to the High Court. The facts of the case which the appellant admitted did not establish that the appellant had himself used the knife.

Held, allowing the appeal in part:

(1) The wording of ss 395 and 397 clearly confer a discretion on the court to add the punishment of whipping.

(2) Section 397 also clearly shows that though a person may be a member of a party committing gang robbery, that provision can only be invoked against him if he is armed with or uses a deadly weapon or causes grievous hurt to any person. In this case, since the facts did not establish that the appellant had used the knife, the sentence of whipping was set aside. The sentences of imprisonment were, however, affirmed.

[Bahasa Malaysia summary

Perayu telah dituduh atas tiga tuduhan perompakan bersekumpulan. Dia dikatakan telah melakukan kesalahan itu pada tiga hari yang berlainan bersama dengan lima orang yang lain. Telah dikatakan juga bahawa suatu senjata yang boleh menyebabkan kematian, yakni, sebilah pisau telah digunakan. Perayu telah mengaku salah terhadap ketiga-tiga tuduhan itu yang boleh dihukum di bawah ss 395 dan 397 Kanun Keseksaan (FMS Bab 45). Mahkamah sesyen telah menjatuhkan hukuman penjara ke atas perayu selama lapan tahun untuk setiap tuduhan dan empat pukulan rotan. Hukuman pemenjaraan itu adalah dikehendaki dijalankan bersama. Hakim mahkamah sesyen telah memutuskan bahawa hukuman sebat adalah mandatori di dalam kes ini. Perayu telah merayu kepada Mahkamah Tinggi. Fakta-fakta kes ini yang telah diakui oleh perayu tidak membuktikan bahawa si perayu sendiri yang telah menggunakan pisau tersebut.

Diputuskan, membenarkan sebahagian rayuan itu:
(1) Perkataan-perkataan yang didapati di dalam ss 395 dan 397 dengan jelasnya memberikan budi bicara ke atas mahkamah untuk menambahkan hukuman sebat.
(2) Seksyen 397 juga dengan jelasnya menunjukkan bahawa sungguhpun seseorang itu boleh menjadi ahli kumpulan yang melakukan perompakan bersekumpulan, peruntukan itu hanya boleh digunakan terhadapnya jika beliau bersenjatakan dengan atau menggunakan suatu senjata yang boleh menyebabkan kematian atau menyebabkan cedera parah kepada sesiapapun. Dalam kes ini, oleh kerana fakta tidak membuktikan bahawa perayu telah menggunakan pisau tersebut, hukuman sebat itu telah diketepikan. Hukuman penjara, akan tetapi, diesahkan.]

Notes
For cases on the sentence of whipping, see 5 *Mallal's Digest* (4th Ed) paras 2354–2365.

Cases referred to
1 *Darus v PP* [1964] MLJ 322 (folld)
2 *Jayanathan v PP* [1973] 2 MLJ 68 (folld)
3 *Emperor v Durg & Ors* AIR 1929 All 260 (folld)
4 *Tan Chew Man v PP* [1977] 2 MLJ 247 (folld)

Legislation referred to
Penal Code (FMS Cap 45) ss 395, 397

Appellant in person.
Thomas Akin (Deputy Public Prosecutor) for the respondent.

Cur Adv Vult

Chong Siew Fai J: The appellant was charged with three offences of gang robbery in that he, together with five others, on three different dates committed the offences in the commission of which substantial cash and property of considerable value were stolen. The offences were said to be punishable under ss 395 and 397 of the Penal Code (FMS Cap 45) ('the Code') since a deadly weapon, namely, a knife, was used.

The appellant pleaded guilty to the three charges for each of which he was sentenced to eight years' imprisonment to run concurrently and four strokes of the rattan. The appellant appeals against sentence.

In sentencing the appellant, the learned sessions court judge said that whipping was mandatory. With respect I am unable to agree. In respect of this form of punishment, the said s 395 provides: '... shall also be liable to whipping', and the said s 397 enacts: '... shall be liable to be whipped, ...'. The wording quoted clearly contained no mandatory or obligatory connotation but confer a discretion to add the punishment of whipping. See *Darus v PP*[1] and cases referred to therein; *Jayanathan v PP*;[2] *Emperor v Durg & Ors*.[3]

A Another point I am to make is this. Section 397 of the Code provides:

> If at the time of committing or attempting to commit robbery, *the offender is armed* with or uses any deadly weapon, or causes grievous hurt to any person, or attempts to cause death or grievous hurt to any person, *such offender* shall be liable to be whipped, in addition to any other punishment to which he may be liable under any other section of this Code. (Emphasis added.)

B The section does not create an offence but confers a discretionary power to impose whipping in addition to any other punishment provided in any other section of the Code. In my opinion, the wording of the said s 397 also clearly shows that though a person may be a member of a party committing the offence of gang robbery, the provision of the section can be invoked against him only if he has actually acted in contravention of the section, ie only if he is armed with or uses a deadly weapon or causes grievous hurt to any person or attempts to cause death or grievous hurt to any person: *Tan Chew Man v PP*.[4]

C

In the instant case, the facts given by the prosecution and admitted by the appellant do not establish that the appellant himself had used the knife. On the other hand, he, in his plea of mitigation, said that he 'was outside the house at the time of robbery', and that he 'sat outside the front of the house while the others went in'.

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In the circumstances and for the reasons given above, I set aside the sentences of whipping imposed by the learned sessions court judge on the three offences. The sentences of imprisonment of eight years on each charge to run concurrently are, however, affirmed. To the above extent, this appeal is allowed.

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Appeal allowed in part.

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Reported by Wong Kian Kheong

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